

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 August 2005

Case No.: **2004-LHC-02278**

OWCP No.: **06-141157**

In the Matter of:

WILLIE B. COLEMAN,
Claimant,

v.

**FLORIDA COAST STEVEDORE/
LIBERTY MUTUAL INSURANCE CO.,**
Employer/Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM,**
Party In Interest

Appearances:

On Behalf of the Claimant:
Douglas E. Daze, Esq.

On Behalf of the Employer/Carrier:
Christopher P. Boyd, Esq.

BEFORE: Richard K. Malamphy
Administrative Law Judge

DECISION & ORDER
GRANTING EMPLOYER'S MOTION FOR SUMMARY DECISION AND DENYING
CLAIMANT'S MOTION FOR SUMMARY DECISION

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq. Willie B. Coleman ("Claimant") injured his back in a fall while working for Florida Coast Stevedore ("Employer").

A formal hearing was scheduled on February 22, 2005 in Jacksonville, Florida. At that time, the parties requested that the undersigned Administrative Law Judge waive the formal hearing in this case and allow them to submit briefs on the parties' simultaneous motions for summary decision. Tr. at 6. The parties indicated that there was no dispute regarding the facts in this case. Id. The undersigned Administrative Law Judge granted the parties' request and the parties subsequently submitted briefs and exhibits in support of their respective motions.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. Preliminary Matters¹

Employer submitted exhibits 1 – 15, to which the Claimant stipulated. Tr. at 7.

II. Issue

Whether Claimant is entitled to future medical benefits in light of Section 33(g) of the Act.

III. Facts

The facts of this case are not in dispute; the parties have stipulated to and I find the facts as follow. See Tr. at 6. Claimant was injured when he slipped and fell at work on September 20, 1991. Claimant was initially treated by Dr. Chapa for his back injury. EX-1 at 1. On February 15, 1992, Claimant consulted Dr. Calvin Hudson, a neurosurgeon, who recommended surgery to repair Claimant's herniated lumbar discs. EX-2 at 2-3. After the March 3, 1992 surgery, Claimant reported the onset of sexual dysfunction. Ex-2 at 4. Dr. Hudson believed that Claimant's impotence was caused by his back condition; he referred Claimant to an urologist, Dr. Mohammed Antar for treatment. Id.

Dr. Antar first treated Claimant with medication, but later recommended the insertion of an inflatable penile prosthesis manufactured by American Medical Systems, Inc. (AMS). EX-3 at 1-4.

On July 30, 1992, Dr. Hudson determined Claimant was at maximum medical improvement with a 20% permanent impairment. EX-2 at 5.

Claimant returned to Dr. Antar on October 31, 1994, to report his penile implant no longer functioned. EX-3 at 5. On November 7, 1994, Claimant underwent surgery to remove the first

¹ The following abbreviations will be used as citations to the record:

JS	-	Joint Stipulations;
TR	-	Transcript of the Hearing
CX	-	Claimant's Exhibits; and
EX	-	Employer's Exhibits.

implant and replace it with a 700 Ultrex Plus penile prosthesis. Id. at 6-7. During surgery, doctors discovered that the AMS implant had ruptured. Id.

Claimant returned to Dr. Hudson on August 1, 1995, reporting increased back pain. EX- 2 at 6. Claimant underwent a second lumbar surgery on August 16, 1995. Id. at 7-8. Claimant's condition continued to improve until June 23, 1998, at which time Claimant again reported an increase in back pain. EX 2 at 9. On July 13, 1998, Claimant had a re-exploration laminectomy with removal of a herniated disc. Id. at 14. Claimant continued to see Dr. Hudson annually, and on January 27, 2003, Claimant again complained of back pain. Id. at 15. Claimant was diagnosed with a lumbar strain and given trigger point injections. Id. On October 22, 2003, Claimant returned to Dr. Hudson again complaining of increased back pain; Claimant had recently been involved in a motor vehicle accident and Dr. Hudson prescribed pain medications. Id. at 16.

Employer paid all of the medical expenses related to Claimant's back injury and impotence treatment, in the amount of approximately \$35,000, and paid workers' compensation benefits to the Claimant in the amount of approximately \$69,000. EX 4 at 1-5; EX 14 at 2.

IV. Procedural History

In March 1993, Claimant filed a negligence claim against the owner of the Ju Yong Guan, the vessel on which he had been injured. On March 15, 1993, the Employer filed a notice of lien in this third party action. In March 1994, Claimant and the owner of the Ju Yong Guan settled the negligence action for \$375,000. EX-15 at 1. Employer filed an LS-33 approving the settlement on April 7, 1994. Id.

Employer agreed to waive its lien on the third party settlement as a Section 8(i) settlement of all past and future Longshore compensation benefits due and owing to the Claimant; medical benefits remained open under the settlement. EX-14 at 2. Employer also made a lump sum payment of \$25,000 as a part of its settlement with Claimant. Id. On May 18, 1994, this settlement was approved. EX-12 at 1-3.

On August 13, 1995, Claimant filed a products liability claim against AMS, the manufacturer of his first penile implant. EX-5 at 1-7. On November 19, 1996, Claimant settled the products liability case with AMS for \$10,500, and his claim was dismissed on January 16, 1997. EX-7 at 1; EX-8 at 1.

Claimant did not provide Employer with notice of the settlement he reached with AMS, nor did he obtain prior written authorization for the settlement in the products liability case; an LS-33 was not filed in relation to the settlement. See EX-9 at 1.

V. Contentions

Claimant contends he is still eligible to continuing medical benefits under the Act. Claimant's Brief at 1. First, Claimant argues that AMS, the implant manufacturer, was not a third party within the meaning of Section 33. Second, Claimant argues that he was not "a person entitled to receive compensation" under Section 33 at the time of his settlement with AMS, due to the pre-existing Section 8(i) settlement with Employer. Finally, Claimant argues that even if his failure to notice Employer of the third party action and obtain Employer's approval of his settlement with AMS would act as a bar to medical benefits, only those benefits relating to his sexual dysfunction treatment would be affected.

Employer, on the other hand, argues that since Claimant failed to notify Employer of his products liability action against AMS or receive prior, written approval of the settlement in that case, Claimant is no longer eligible to receive medical benefits pursuant to Section 33(g) of the Act.

VI. Discussion and Conclusions of Law

The parties have both requested that this case be resolved on motion for summary decision. Summary decision is appropriate when no genuine issue of a material fact has been raised. 29 C.F.R. §18.41(a). The parties have stipulated to all material facts, and submit that the only issue to be resolved is the legal question of whether Claimant's further benefits are barred by Section 33 (g) of the Act.

Section 33(g) of the LHWCA provides, in pertinent part:

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(g)(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C. § 933(g)(1)-(2).

Section 33(a) defines a third person as, “some person other than the employer or a person or persons in his employ” who “is liable in damages.” 33 U.S.C. § 33(a).

Section 33(g) is intended to ensure that an employer's rights are protected in a third-party settlement and to prevent a claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. § 933(b)-(f). See Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992).

Section 33(a) Analysis

As a threshold matter, Claimant argues that AMS is not a third person within the meaning of the Act, since it did not cause Claimant’s initial injury. Claimant’s Brief at 1.

It is well-settled that a Longshore Employer is liable for all injuries arising from the original, work-related accident. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983) (holding, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury).²

While this case involves a third party products liability suit, prior case law regarding third party medical malpractice claims is instructive. In Shahady v. Atlas Tile & Marble Co., 18 BRBS 58 (ALJ) (1985), the Administrative Law Judge held that claimant Shahady’s physician was a third person with the meaning of Section 33 following the settlement of a medical malpractice action. In Mills v. Marine Repair Service, 21 BRBS 115 (1988), the Board reversed the Administrative Law Judge’s finding that a malpractice suit did not fall within the scope of Section 33: “the malpractice suit is encompassed within Section 33, as it is a suit relating to the employee’s death for which benefits were sought under the Act.” *Id.* at 119. The Board held that Section 33 does not apply when “the third parties are not potentially liable to both claimant and employer” in a case in which a claimant had sustained two separate injuries while employed by two different employers. Goody v. Thames Valley Steel Corp., 31 BRBS 29, 32 (1997). Again, the Board held that the Section 33 bar was inapplicable when a claimant sought Longshore benefits for disability due to the primary injury alone, and the claimant's third-party recovery was solely based on subsequent malpractice, and not the natural, unavoidable result of his work-related injury. White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995).

Here, Dr. Hudson, Claimant’s treating physician, opined that Claimant’s sexual dysfunction was directly caused by his back injury. EX-2 at 4. Thus, Employer was liable for the treatment of Claimant’s impotence. Clearly, Claimant’s condition was worsened by the faulty implant

² Claimant also argues that even if Section 33(g) applies to this case, the bar should only affect medical benefits for Claimant’s sexual dysfunction treatments, rather than treatment for his back injury as well. Claimant cites no authority for his proposition. Furthermore, this argument is contrary to the well-settled view that an injury and any resulting physical maladies form a single compensable injury. See Bludworth Shipyard, 700 F.2d 1046, 15 BRBS 120 (CRT); Goody v. Thames Valley Steel Corp., 31 BRBS 29, 32 (1997); compare with White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995) (holding, since employer was not liable for the injuries claimant suffered when he was dropped during hospital care, the employer could not invoke the Section 33 bar in relation to the resulting malpractice settlement). Thus, Claimant’s argument is without merit.

manufactured by AMS, necessitating further surgery, making AMS liable for damages as well. Thus, AMS is a “third person” within the meaning of Section 33(a).

Section 33(g) Analysis

In order for the Section 33(g)(1) bar to take place:

1. One must be considered a “person entitled to compensation” at the time of the settlement in question;
2. One must not have received the prior written permission of the employer to enter into the third-party settlement; and
3. The third party settlement must be for less than the compensation to which the person is entitled under the Act.

See Cowart, 505 U.S. 469 (1992); Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (9th Cir. 1990); Harris v. Todd Pac. Shipyards Corp. [Harris II], 28 BRBS 254 (1994); aff’d and modified on recon., 30 BRBS 5 (1996) (en banc).

“Person Entitled to Compensation”

Claimant meets the statutory and judicial definition of a “person entitled to compensation” for the reasons discussed below.

Since the forfeiture provisions of Section (g)(2) only apply if the Claimant is subject to the written approval requirements of the statute, the Employer must show that Claimant is a “person entitled to compensation” when attempting to invoke the Section 33 bar. 33 U.S.C. §933(g)(1); Cowart, 505 U.S. at 475.

The Supreme Court discussed the phrase “person entitled to compensation” in Cowart, and held that the statutory language is “plain.” Id. at 478. Under the Cowart case, a “person is entitled to compensation” when he or she “satisfies the prerequisites” for compensation under the Act. Id. at 476. The prerequisite for recovery under the Longshore Act is satisfied when the Claimant sustains an injury. Id. Furthermore, “the relevant time for examining whether a person is ‘entitled to compensation’ is the time of settlement.” Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248, 255 (1997) (holding that the wife of a longshore claimant who signed third party settlements before her husband’s death was not barred by Section 33 from claiming death benefits as a widow.)

Thus, the question in this case becomes whether Claimant was a person entitled to receive benefits at the time he settled with the third party, AMS.

Claimant entered into a Section 8(i) settlement with Employer, which was approved by the District Director on May 18, 1994. At that point, the Claimant released Employer from all further liability for worker’s compensation benefits. EX-12 at 2.

Employer maintains Claimant is still a person entitled to benefits even though he has released Employer from all future liability. Employer's Brief at 11-12. In doing so, Employer relies on Reynolds v. Todd Pac. Shipyards Corp., 122 F.3d 37 (9th Cir. 1997). In that case, the employer had denied liability for asbestos exposure that Reynolds claimed contributed to her husband's death. Id. at 37. Subsequently, Reynolds entered into several third party settlements without obtaining Todd Pacific's prior written approval. Id. The Administrative Law Judge in that case found that Reynolds's claim for death benefits under the Longshore Act was barred by Section 33(g). Id. The Ninth Circuit upheld both the Administrative Law Judge and the Board's denial of benefits, reasoning that under Cowart, a person is entitled to benefits at the he or she sustains injury; whether he or she is actually receiving benefits at the time is immaterial. Id. at 38.

In another Ninth Circuit case, Bethlehem Steel Corp. v. Mobley, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990), the Circuit court held that claimant Mobley was not subject to the Section 33 bar. There, the claimant had been injured but had no residual disability; he only sought medical benefits. Id. The court reasoned that Congress did not intend to compel compliance with Section 33(g)(1) by a claimant who was not receiving worker's compensation payment, as Section 33(g)(1) specifically mentions "compensation," and Section 33(g)(2) discusses both "compensation" and "medical benefits." Id. at 560-1, 24 BRBS at 52 (CRT); see also Marshall v. Pletz, 317 U.S. 383 (1943)(holding, the term "compensation" as used in Section 13 of the Act does not include medical benefits); Harris II, 30 BRBS at 6-13 (holding, claimants in an occupational disease case were not "persons eligible to receive compensation" since they did not yet have a physical impairment under the AMA Guides, despite their entitlement to medical benefits).

Claimant Coleman is more like the claimant in Reynolds. Unlike the claimants in Mobley and Harris, Claimant Coleman has an undisputed permanent disability of 20% to the whole body. The fact that he received his compensation in a lump settlement and is not currently drawing disability benefits should not enable Claimant to bargain away rights Employer may have against a third party; nor should it enable Claimant to recover twice for the same injury.

Settlement Without Permission

The parties do not dispute that the second requirement, Claimant's entering into a settlement without Employer's prior written permission, is fulfilled.

Comparison of Settlement Amount with Compensation Due Under the Act

The third and final requirement for the invocation of the Section 33 bar is that the third party settlement must be "for an amount less than the compensation to which the person would be entitled under the Act." Harris II, 30 BRBS at 12. The Administrative Law Judge "must compare the amount of the third-party settlements to the amount of compensation only, not including medical benefits, to which Claimant would be entitled under the Act." Id.

The parties stipulated that the Employer/Carrier had paid approximately \$69,000 in compensation benefits to Claimant up to the time of the Section (8)(i) settlement in April 1994. EX-4 at 3-5; EX-14 at 2. At the time of the Section (8)(i) Settlement, the Employer paid Claimant an additional lump sum of compensation in the amount of \$25,000. EX-14 at 2.

Thus, as Claimant received approximately \$94,000 in compensation payments from Employer and the amount of the AMS settlement was \$10,500, this third requirement is met. See EX-7 at 1.

VII. Order

1. Employer's Motion for Summary Decision is GRANTED.
2. Pursuant to Section 33(g)(1)-(2) of the Longshore Act, Claimant's medical benefits are hereby terminated.
3. Claimant's Motion for Summary Decision is DENIED.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia